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Perjury Under Federal Law: A Sketch of the Elements

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Summary

There are three general federal perjury laws. One, 18 U.S.C. 1621, outlaws presenting material false statements under oath in federal official proceedings. A second, 18 U.S.C. 1623, bars presenting material false statements under oath before or ancillary to federal court or grand jury proceedings. A third, 18 U.S.C. 1622 (subornation of perjury), prohibits inducing or procuring another to commit perjury in violation of either section 1621 or section 1623. This report describes the provisions of the three statutes. It is an abbreviated version of CRS Report 98-808, *Perjury Under Federal Law: A Brief Overview*, stripped of most footnotes and citations. This report will be updated consistent with the dictates of 2 U.S.C. 166(d)(5).

Introduction

Although it now covers more than court proceedings, the definition of perjury has not changed a great deal otherwise since the framing of the Constitution. Blackstone described it as “a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *wilfully, absolutely and falsely*, in a matter *material* to the issue or point in question.”

Perjury Under 18 U.S.C. 1623

“Congress enacted §1623 as part of the 1970 Organized Crime Control Act to facilitate perjury prosecutions and thereby enhance the reliability of testimony before federal courts and grand juries.” It nevertheless embodies most of the same basic perjury elements (stripped of some of the technical requirements) and carries the same penalties as the more traditional section 1621. Parsed into elements, it declares that:

- I. Whoever
- II. a. under oath or
- b. in any

- i. declaration,
- ii. certificate,
- iii. verification, or
- iv. statement

under penalty of perjury as permitted under section 1746 of title 28, United States Code

- III. in any proceeding before or ancillary to
 - a. any court or
 - b. grand jury of the United States

IV. knowingly

- V. a. makes any false material declaration or
 - b. makes or uses any other information, including any
 - i. book,
 - ii. paper,
 - iii. document,
 - iv. record,
 - v. recording, or
 - vi. other material,

knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both,” 18 U.S.C. 1623(a)(enumeration added).

In most cases, the courts abbreviate their description of the elements and state that to prove perjury the government must establish that the defendant “(1) knowingly made a (2) false (3) material declaration (4) under oath (5) in a proceeding before or ancillary to any court or grand jury of the United States.”

The forum for the allegedly perjurious declaration must be a “proceeding before or ancillary to any court or grand jury of the United States.” An interview in an attorney’s office in preparation for a judicial hearing cannot be considered such an ancillary proceeding, but the phrase “proceedings ancillary to” court or grand jury proceedings does cover proceedings to take depositions in connection with civil litigation, as well as a variety of pretrial proceedings in criminal cases, including bail hearings, venue hearings, or suppression hearings.

The Supreme Court’s observation that a statement that is misleading but literally true cannot support a conviction under section 1621 because it is not false, applies with equal force to perjury under section 1623. Similarly, perjury cannot be the product of confusion, mistake, or faulty memory, but must be a statement that the defendant knows is false, although this requirement may be satisfied with evidence that the defendant was deliberately ignorant or willfully blind to the fact that the statement was false. On the other hand, a defendant cannot be guilty of perjury for a truthful answer to a reasonable interpretation of an ambiguous question.

Materiality is perhaps the most nettlesome of perjury’s elements. It is usually said that a statement is material “if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to whom it is addressed.” This definition is not easily applied to false statements made in civil depositions. In such cases, one appellate court has recently described the lower federal courts as divided between the view (1) that a statement in a deposition is material if a “truthful answer

might reasonably be calculated to lead to the discovery of evidence admissible at the trial of the underlying suit” and (2) that a statement is material “if the topic of the statement is discoverable and the false statement itself had a tendency to affect the outcome of the underlying civil suit for which the deposition was taken.” In any event, a statement is no less material because it did not or could not divert the decisionmaker.

Subsection 1623(c) permits a perjury conviction simply on the basis of two necessarily inconsistent material declarations rather than a showing that one of the two statements is false.

Conviction does require showing, however, that the two statements were made under oath; it is not enough to show that one was made under oath and the other was made in the form of an affidavit signed under penalty of perjury. Moreover, the statements must be so inherently contradictory that one of them of necessity must be false.

Subsection 1623(e) permits a perjury conviction without compliance with the traditional two witness rule. Some years ago, the Supreme Court declined to reverse an earlier ruling that “[t]he general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment.” The two witness rule rests on a common law rather than a constitutional foundation and consequently can be abrogated by statute which Congress has done in subsection 1623(e) without offending constitutional principles.

In contrast to the other subsections of section 1623, subsection 1623(d) offers a bar to prosecution of those accused of perjury under the section. The defense is stated in fairly straightforward terms, “[w]here in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed,” 18 U.S.C. 1623(d). Although phrased in different terms, the courts seem to agree that repudiation of the false testimony must be specific and thorough.

Perjury Under 18 U.S.C. 1621

Section 1621 was “enacted in an effort to keep the course of justice free from the pollution of perjury.” When Congress passed section 1623, it did not repeal section 1621 either explicitly or by implication; where its proscriptions overlap with those of section 1623, the government is free to choose under which it will prosecute. In many instances, it affords greater protection than section 1623. It prohibits perjury before official proceedings — both judicial and nonjudicial. Separated into its elements, the section provides that:

(1)

- I. Whoever having taken an oath
- II. before a competent tribunal, officer, or person,
- III. in any case in which a law of the United States authorizes an oath to be administered,
- IV. a. that he will

- i. testify,
 - ii. declare,
 - iii. depose, or
 - iv. certify truly, or
 - b. that any written
 - i. testimony,
 - ii. declaration,
 - iii. deposition, or
 - iv. certificate
- by him subscribed, is true,
- V. willfully and contrary to such oath
- VI. a. states or
- b. subscribes
- any material matter which he does not believe to be true; or

(2)

- I. Whoever in any
 - a. declaration,
 - b. certificate,
 - c. verification, or
 - d. statement
 under penalty of perjury as permitted under section 1746 of title 28, United States Code,
 - II. willfully subscribes as true
 - III. any material matter
 - IV. which he does not believe to be true
- is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States,” 18 U.S.C. 1621 (enumeration added).

The courts generally favor the abbreviated encapsulation from *United States v. Dunnigan*: “A witness testifying under oath or affirmation violates this section if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.”

Testimony that is literally true , even if deceptively so, cannot be considered false for purposes of a prosecution under section 1621. On the other hand, under either section 1621 or section 1623 the false statement may consist of testimony that the witness does not remember or does not know when the evidence clearly demonstrates that he does.

The test for materiality under section 1621 is the same as it is under section 1623 — “whether the false statement has a natural tendency to influence or [is] capable of influencing the decision required to be made.”

Conviction under section 1621 requires not only that the defendant knew his statement was false (“which he does not believe to true”), but that his false statement is “willfully” presented. There is but scant authority on precisely what “willful” means in this context. The Supreme Court in dicta has indicated that willful perjury consists of

“*deliberate* material falsification under oath.” Other courts have referred to it as acting with an “intent to deceive” or as acting “intentionally.”

Subornation of Perjury

Section 1622 outlaws procuring or inducing another to commit perjury: “Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned for not more than five years, or both, 18 U.S.C. 1622. The crime consists of two elements — (1) an act of perjury committed by another (2) induced or procured by the defendant. Perjury under either section 1621 or 1623 will support a conviction for subornation under section 1622, but commission of an act of perjury is a necessary element of subornation. Although the authorities are exceptionally sparse, it appears that to suborn one must know that the induced statement is false and that at least to suborn under section 1621 one must also knowingly and willfully induce.